19/11/12

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

19 November 2012 JS Molefe
DATE SIGNATURE

A196/12
CASE NUMBER: ~~A233~~/2012
Date Heard: 01 October 2012
Date of Judgement:

In the matter between:

TAPELO JACOB TSOTETSI APPELLANT

and

THE STATE RESPONDENT

JUDGEMENT

MOLEFE AJ:

[1] The appellant was the second of the two accused who were charged and convicted in the High Court (Circuit Local Division) of the Eastern Circuit District held at Secunda of: Count 1 murder and Count 2 attempted robbery with aggravating circumstances.

[2] On 21 June 2004 before Motata J, the appellant was sentenced to life imprisonment for the murder charge and to 15 years' imprisonment for the attempted robbery with aggravating circumstances. It was ordered

that the sentence of 15 years should run concurrently with the sentence of life imprisonment.[1]

[3] The appellant brought an application for leave to appeal against the two convictions and the sentences imposed in respect of them. Leave to appeal was granted by Van der Merwe J, on the 10 August 2010.

[4] The appellant's counsel [2] submitted that the crux of the appeal on conviction was the establishment and proof of the identity of the perpetrator(s) as well as the establishment and proof of common purpose and the perpetrator's (or perpetrators') intent. It was the appellant's counsel's contention that the State's case stood and fell on the establishment of common purpose and intent as it relied on the evidence of the section 204 witness's testimony as its core.

[5] According to the appellant's counsel the evidence did not establish any intent or planning or premeditation by the appellant to kill.. In addition it was contended that the section 204 witness did not witness the stabbing and had not established that their plan (i.e. first accused, the appellant and the Section 204 witness) was to rob the deceased after tying him up. The appellant's counsel relied in this regard on the decision in ***S v Nango 1990 (2) SACR 450(A)*** that murder and attempted robbery were not the only inferences that stood to be drawn, to the exclusion of any other while accounting for all the facts.

[6] Counsel for the appellant submitted that the trial court had to *subjectively* ascertain who did the stabbing and whether the stabber foresaw that his actions could result in the death and wounding of the

[1] P 163 of record
[2] Adv J Van Rooyen

deceased. The facts showed that the plan was only to tie the deceased in order to rob him. Accused one played a leading role in the planning and in the execution of the plan and it was he who was in possession of the rope and knife, before, during and after the stabbing. Testimony also repeatedly referred to a single person stabbing the deceased. Appellant's counsel's submission was that from the record it was clear that the appellant was not the stabber and that the person who stabbed the deceased was the first accused.

[7] The submission by the appellant's counsel was that the State had failed to prove the identity of the stabber and the trial court relied on the doctrine of common purpose to convict the appellant although the facts and evidence pointed to accused one acting solo, without common purpose and not following the plan that had been agreed upon. Liability because of common purpose arises on proof beyond reasonable doubt of either a prior agreement or active association where after the conduct of the participants in the execution of their joint deed could be imputed to the appellant. The appellant's counsel was adamant that there was no prior agreement among the accused persons to stab the deceased as the plan was to tie him up and rob him. He also submitted that the evidence was that the appellant was only holding the deceased down when the deceased was being stabbed, that the appellant ran away in fear after the stabbing and that he was petrified and visibly shaken when approached by the police. Therefore he submitted that no active association on the part of the appellant was established by the State.

[8] The appellant's counsel's submission was that the conviction for attempted robbery ought to be set aside as nothing was taken from the deceased, nor was there any attempt to assume control over anything belonging to the deceased. Nothing belonging to the deceased was

found in any of the three perpetrators' possession. Counsel argued that the conviction and sentence for attempted robbery ought to be set aside as there was no evidence to support the conviction[3].

[9] Counsel for the appellant argued that the trial court did not find substantial and compelling circumstances present in deciding the imposition of a sentence and that the life imprisonment and the 15 years' imprisonment which were to run concurrently, culminating in an effective sentence of life imprisonment was shockingly disproportionate, warranting interference on appeal. It was counsel's submission that the appellant only held the deceased down and fled after the stabbing and that this lessened his moral blameworthiness and ought to reflect in the sentence to be imposed.

[10] Appellant's counsel argued that common purpose was not proven and that the murder could not be attributed to the appellant. He argued that the prescribed minimum sentence of life imprisonment could only be imposed where common purpose was proven. He submitted that life imprisonment should be imposed with care and after thorough consideration and in this regard he referred and quoted the following statement in ***S v GN 2010(1) SACR 93T at 97 (110)*** ".....even where imprisonment for life is prescribed as a minimum sentence a court must bear in mind that it is the ultimate penalty that the courts in this country can impose. As such, it must not be imposed lightly, even when it is a prescribed minimum sentence".

[11] Regarding the sentence of 15 years' imprisonment for attempted robbery, it was the submission of the appellant's counsel that the 15 years sentence was shockingly inappropriate and disproportionate to the interests of the appellant if the conviction was to be confirmed. The

[3] SV Nkosi 2012 (1)SACR 87 (GNP)

prospect of rehabilitation should play a prominent role on appeal he argued in the case where the appellant is a 20 year old first offender there is hardly a person of whom it can be said that there is no prospect of rehabilitation[4]. He further argued that the appellant was suffering mental anguish because to the undue delay from 21 June 2004 to the date of appeal (in excess of 8 years 3 month) as since he was sentenced he had no clarity to his future. Appellant's counsel referred to ***S v Roberts 2000 (2) SACR522 (SCA)*** and ***Michele v S (477/2008) [2009] ZASCA 116 AT [13]*** where the following was stated "In my view, it is a factor to which this court should have regard in the assessment of an appropriate sentence" Appellant's counsel requested that this was to be taken into consideration on the appeal. The appeal court should also take into consideration that the appellant spent 16 months in custody awaiting trial[5]

[12] The counsel for the State [6] submitted that the appellant denied knowing the section 204 witness, accused 1 or having been involved in the crimes in *casu*[7] He denied being called Sibusiso yet this was never denied or put to the section 204 witness.[8] He could however not provide any reason why the section 204 witness would falsely implicate him.

[13] The appellant and accused 1 raised an alibi as a defence and testified that they were both at home at the time of the commission of the offences. The trial court found that their version was not reasonably possibly true in the light of all the evidence.[9]

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[4] Sv Nkomo 2007(2) SACR 198 (SCA) at 24, 30.

[5] Sv Ndlovu 2007 (1) SACR 535 (SCA) at 538 [12] to 535 (SCA) at 538 [12] to 539 [14]; Sv May 2005 (2) SACR 331 (SCA) ;Sv Bhengu 2011(1) SACR 224 (KZP) 229j – 230i.

[6] Adv F Leonard SC

[7] Record p132

[8] Record p133

[9] Record p148 to p 250 1.2

[14] The respondent's counsel also submitted that the appellant and accused 1 had a common purpose to kill the deceased because this could be inferred from the facts and by implication, this was the finding of the trial court. It was the appellant who replied to section 204 witness's question why the deceased was stabbed in saying: "this was done to the white man because he did not give a hearing and that he was cheeky."[10] The appellant did not run away when the stabbing started or complain about the stabbing nor did he attempt to prevent the stabbing. In fact he stayed near the body of the deceased with accused 1 until the section 204 witness returned with a rope and he chose to explain why the deceased had been stabbed. It was submitted that both his words and actions manifested his sharing of a common purpose in that he performed some act of association with the conduct of accused 1, if indeed is was accused 1, and not the appellant, that stabbed the deceased.

[15] It was the respondent's counsel's submission that the fact that the deceased was stabbed with a knife in his back, seven times, with various degrees of force and on extremely life threatening parts of his body, the intention to kill must be inferred from the facts of the matter. Such an intention is the only reasonable inference consistent with the proven facts.[11]

Regarding the count of attempted robbery with aggravating circumstances, counsel for the respondent submitted that it was the declared and planned intention of the three accused to rob the deceased of money he was suspected to have had, by reason of him having been the paymaster of the local municipality. A knife and rope were taken along for this purpose. It was also his submission that violence was

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[10] Record p 79 l.2 etc
[11] R v Blom 1939 AD 188 at 202 - 203

directed at the deceased with the intention to take his property. There was therefore a completed attempt to rob the deceased and the attempt at robbery was completed. The appellant was correctly convicted of murder and attempted murder attempted robbery with aggravating circumstances by the trial court.

[16] Ad sentence: the respondent's counsel submitted that it is trite law that sentence is a matter of discretion of the trial court. The right of a court of appeal to interfere with the exercise of the discretion is limited. The question is ultimately whether there was proper and reasonable exercise of discretion. In support of this he referred to the decision of the Supreme Court of Appeal in **S *v Kgosimore 1999 (2) SACR ECG 238 (SCA) AT 241 PAR 10.***

[17] The respondent's counsel referred to section 51 of Act 105 of 1997, which prescribes a sentence of life imprisonment for murder. He emphasized that it is clear that a knife was taken along with which the deceased was stabbed. It is not known who between accused 1 and appellant did the stabbing, but that on the doctrine of common purpose this is immaterial. In any event the appellant had played a role in the crime.

[18] The respondent's counsel argued that the fact that the appellant was 20 years at the time of the commission of the crime is not a reason to find compelling and substantial circumstances. If he had intended to persuade the court to impose a lesser sentence he had to raise the circumstances pertinently. This had not been done. Respondent's counsel referred in his argument to ***S v Malgas 2001 (1) SACR 469 (SCA) at par [9] and S v Rosslee 2006 (1) SACR 537 SCA.***

[19] The aspect of awaiting trial period by the appellant was not raised in the trial court or in the notice of appeal. It was the respondent counsel's submission that there was no uniform approach to the effect of the period awaiting trial on sentence. It was also his submission that it is of academic value in present case because the trial court ordered that the sentence for attempted robbery must run concurrently with the sentence for murder namely, life imprisonment. He submitted that the convictions and sentences be confirmed.

Ad Conviction

[20] I agree with the respondent's counsel that the appellant and accused 1 had a common purpose to kill the deceased as was inferred from the facts and implications. The appellant was holding the deceased down and was watching accused 1 stabbing the deceased seven (7) times. He failed to stop or attempt to stop the stabbing or complain about it and did not even run away when the stabbing was being executed. He therefore performed some act of association with the conduct of accused 1.

[21] In ***Sefatsa 1988 (1) SA 868 A***, in a unanimous judgment delivered by Botha JA, the then Appellate Division confirmed the conviction of the six accused who had been convicted of murder. The Appellate Division did so on the doctrine of common purpose. It found that the accused all had the common purpose to kill the deceased. The court rejected the argument advanced on behalf of the accused that they could be convicted of murder only if a causal connection were proved between the individual conduct of each of the accused and deceased's 's death.[12] The court in fact assumed that it had not been proved that the individual conduct of

[12] At 896 E

any of the six accused contributed causally to deceased's death.[13] It is sufficient that the individual participant actively associated himself with the execution of the common purpose.[14]

[22] In ***Thebus***[15] the Constitutional Court held that the common purpose doctrine is compatible with the Constitution of the Republic of South. The doctrine does not infringe an individual's right to dignity and freedom. It is according to the court rationally linked to a lawful aim, namely the combating of criminal activities by a number of people acting together. If the doctrine did not exist there would have been the unacceptable situation that only the person who had committed the principal act (in other words, who actually stabbed the deceased with a knife in his chest) would have been guilty, whereas those who have intentionally contributed to the commission of the principal act would not have been guilty of the crime committed by the principal perpetrator.

[23] Regarding the attempted robbery with aggravating circumstances, I am satisfied that there was a completed attempt to rob the deceased of money, and evidence showed that the accused persons had a knife and a rope to execute their attempted robbery. The deceased was tied with a rope and stabbed seven times. Although nothing was taken from the deceased, the appellant, accused 1and the section 204 witness intended to rob the deceased and engaged in conduct that was not merely preparatory but had reached the commencement of the execution of the intended crime of robbery with aggravating circumstances. As a general rule if the accused persons had done everything they set out to do in order to commit the crime but the crime was not completed, they are guilty of attempt.

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[13] At 894 F-G
[14] At 901
[15] 2003 2 SACR 319 (CC) The judgement is also discussed by Reddi 2005 SALJ 96

[24] Considering the evidence on both counts the appellant have been convicted on I am satisfied that the State proved the case against the appellant beyond reasonable doubt and the convictions must stand.

Ad Sentence

[25] It is trite law that the appeal court's powers to interfere with the trial court's sentence are circumscribed. The appeal court may interfere only when misdirection is found on the part of the trial court or where the sentence imposed induces the sense of shock.

[26] The charges put to the appellant are, as set out in the indictment, not read with the provision of section 51 (1) of Criminal Law Amendment Act 105 of 1997 (CLAA). The application of the provisions of the CLAA are first mentioned by the trial judge only at sentence stage when he said "the crime of murder is frowned upon by everybody and to illustrate this, the parliament has enacted the Criminal Law Amendment Act 105 of 1997 and they said this crime is one of the crimes that must be stamped out and the purpose therefore was that there must be uniformity in sentences which would obliterate this type of crime."[16]The judge further said that '... in terms of the act (*sic*) I referred to, is that there are no substantial and compelling factors, I should sentence you to life imprisonment",[17] to which he did[18]

[27] In ***S v Makatu 2006 (2) SACR 582 (SCA)*** the court found a misdirection to have been committed by the trial court when sentencing a convict to life imprisonment relying on the provisions of section 51(1) of the CLAA while the indictment referred to section 51(2) of CLAA

[16] Sentence page 159 line 15-23
[17] I bid page 160 line 9-11
[18] I bid page 163 line 24

respectively. The principle was applied and followed most recently in ***S v Mashini and another 2012(1) SACR 604 (SCA).***

[28] Considering the principles set out in the above mentioned cases, I am of the view that there was a misdirection on the part of the trial court by sentencing the appellant to life imprisonment relying on the provisions of the CLAA. On this leg alone, the appeal on sentence stands to be upheld. Considering the appellant's personal circumstances placed on record in mitigation which I am not going to repeat save to emphasise that the appellant is a first offender. The appellant's youthfulness at the time of the commission of the offence coupled with the period he spent in custody while awaiting trial should have been considered. In that light, I am of the view that life imprisonment is indeed disproportionate with the offence committed. The sentence stands to be set aside.

[29] I, in the result, make the following order:

(i) The appeal against the convictions of murder and robbery with aggravating circumstances is dismissed;

(ii) The appeal against the sentence imposed on charge of murder is set aside and replaced with the following:

"Count 1: The accused is sentenced to 18 (eighteen) years imprisonment

Count 2: The accused is sentences to 15 years imprisonment. The sentence in count 2 is ordered to run concurrently with the sentence on count 1".

(iii) In terms of section 282 of the Criminal Procedure Act 51 of 1977, the sentence is antedated to 21 June 2004.

(iv) The prison authorities are ordered to deduct the period already served by the appellant while awaiting trial when calculating the date upon which the sentences imposed is to expire.

D.S. Molefe
Acting Judge of the High Court

I agree.

A.M.L. Phatudi
Judge of the High Court

I agree.

S. K. Hassim
Acting Judge of the High Court

Appearances:

On Behalf of the Appellant:

Pretoria Justice Centre
2nd Floor FNB Building
262 Church Street
PRETORIA
Mr Jan Van Rooyen: Attorney

On Behalf of the Respondent:

Director Public Prosecution
Private Bag x300
Pretoria
0001
Adv. E Leonard SC